231480

BEFORE THE
SURFACE TRANSPORTATION BOARD

SUNBELT CHLOR ALKALI PARTNERSHIP

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

and

UNION PACIFIC RAILROAD COMPANY

Defendants.

Docket No. NOR 42130

DEFENDANT NORFOLK SOUTHERN RAILWAY COMPANY'S REPLY TO DEFENDANT UNION PACIFIC RAILROAD COMPANY'S MOTION FOR PARTIAL DISMISSAL OR, IN THE ALTERNATIVE, EXPEDITED DETERMINATION OF JURISDICTION OVER CHALLENGED RATES

Defendant Norfolk Southern Railway Company ("NS") respectfully submits this Reply to Defendant Union Pacific Railroad Company's ("UP's") September 26, 2011 Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates ("Motion"). NS submits this reply for two primary reasons. First, UP's Motion presents substantial questions about the Board's jurisdiction over large portions of SunBelt Chlor Alkali Partnership's ("SunBelt's") rate challenge. The Board should rule on UP's Motion before the parties develop and submit SAC evidence. UP has provided SunBelt with a "local rate," and UP contends that SunBelt's rate challenge against UP – and hence the market dominance inquiry for that rate challenge – must be limited to that local rate and route. UP presents a substantial argument that it does not possess market dominance over its local rate at issue in this case, and the Board therefore lacks jurisdiction to consider a challenge to that rate. If the Board does not resolve the important threshold jurisdictional questions presented by UP now, the parties may be

compelled to develop SAC evidence for multiple different SARR systems – one for the rate that applies to a UP-NS interline movement from McIntosh, Alabama, to LaPorte, Texas, and one for the rate that applies to an NS local movement from McIntosh to New Orleans – despite the fact that one of those sets of evidence will be rendered unnecessary and irrelevant by the Board's eventual determination of whether UP possesses market dominance.[1] For similar reasons, if the Board denies UP's Motion to Dismiss, it should grant UP's alternative request for expedited determination of market dominance.

Second, NS submits this Reply to make clear that if the Board dismisses UP from this case (now or after expedited review of market dominance), then (1) what would remain is a challenge of NS's local rate from McIntosh, Alabama, to New Orleans, Louisiana; and (2) SunBelt could not properly rely—in a rate case against remaining defendant NS—upon a SARR that would include traffic on the UP rail system in the SARR traffic group. If SunBelt elects to pursue a SAC challenge to the NS rate that applies to the issue movement, then it must choose a traffic group and develop a stand-alone railroad that would, *inter alia*, provide service comparable to that provided by NS for the selected traffic, including SunBelt's traffic between

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[1] In the event that the Board ruled that UP lacks market dominance over the transportation subject to its local rate. but that UP and NS had market dominance over the joint rate that applied from March 31 to July 30, 2011, and SunBelt then elected to pursue a separate SAC challenge to the joint rate that was in effect for four months, then SAC evidence concerning the joint movement over the UP and NS systems would remain relevant to that short-term rate challenge. while SAC evidence concerning the NS local movement would be relevant to the overwhelming majority of the case. UP's present Motion does not challenge market dominance for the four-month period in which the joint rate applied. *See* UP Motion at 3, n.1. UP has requested that, if the Board considers market dominance separately on an expedited basis, that it consider all market dominance issues at the same time (i.e. market dominance issues with respect to all periods covered by the Complaint). *See id.* If the Board were to find that the defendant carriers lacked market dominance over the transportation at issue during the short period the joint rate was in effect (and that UP lacks market dominance over its local segment thereafter), then SAC discovery and evidence for the UP system would be irrelevant to the entire case.

McIntosh and New Orleans. The reasonableness of NS's local rate may not be evaluated based on a traffic group selected even in part from UP traffic or other traffic that does not move on the NS system. Furthermore, should UP be dismissed from the case, NS *will not argue* that a challenge limited to NS's local tariff rate for its movement of SunBelt traffic on the McIntosh-New Orleans segment is improper because it does not encompass the entire interline movement.[2] Thus, SunBelt's speculation in its Reply that if UP's motion to dismiss were granted "NS undoubtedly would file its own motion to dismiss" based on SunBelt's failure to challenge a through rate from McIntosh to LaPorte (*see* SunBelt Reply at 4), is moot. NS will not file such a motion.

To eliminate any doubt or confusion about SunBelt's ability to maintain a separate challenge to the NS rate, NS has revised its tariff for the issue movement to make clear that it is strictly a local rate (*i.e.*, a rate for movement on the NS system that need not be used with another carrier's rate to move the traffic to another destination). *See* NSRQ 65912 (Dec. 13, 2011) (copy attached as Exhibit A).[3] As the Board recently affirmed, such a rate is "separately challengeable."[4] *See Arizona Electric Power Cooperative v. BNSF Ry. Co. & Union Pac R.R.*

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[2] NS does not concede it has market dominance over the transportation of SunBelt traffic from McIntosh to New Orleans, and reserves its right to present evidence and argument at the appropriate time that it lacks market dominance over that transportation and that the Board lacks jurisdiction over a challenge to NS's rate for that segment.

[3] SunBelt may use NS's local rate and another carrier's (BNSF or UP) local rate from New Orleans to LaPorte to construct a combined rate for interline movement of its traffic from McIntosh to LaPorte.

[4] Both the local NS rate and the NS Rule 11 rate that was in effect prior to that local rate (*i.e.* from July 30, 2011 to the effective date of the local tariff) are encompassed by NS's agreement not to contest the propriety of a SunBelt challenge limited to the NS rate in the event that UP is dismissed. NS is making this concession in light of the unusual history and circumstances of this case and only for purposes of this case. As a general matter, NS does not concede that an individual proportional rate may be separately challenged. It agrees not to contest a challenge to

Co., STB Docket No. NOR 42113, slip op at 13 (served Nov. 22, 2011) ("*AEPCO*") ("[D]efendants could have insulated themselves from a joint-rate challenge by issuing separately challengeable rates to the chosen point of interchange instead of a single joint rate"); *see also Metro. Edison Co. v. Conrail*, 5 I.C.C.2d 385, 406 n.27 (1989).

I. BACKGROUND[5]

From 1997 through March 31, 2011, NS, UP, and SunBelt were parties to a joint transportation contract under which NS transported chlorine from SunBelt's McIntosh, Alabama chlor alkali production facility to New Orleans, LA, and UP moved the traffic from interchange at New Orleans to its destination in LaPorte TX. *See* Complaint ¶ 7 The parties were attempting to negotiate a new transportation contract when the previous contract expired on March 31, 2011. In order to facilitate further negotiations aimed at reaching a new transportation contract, NS and UP issued a series of joint tariff rates to cover movement of SunBelt's chlorine from McIntosh to LaPorte during those negotiations. Several separate times in the spring and summer of 2011, NS granted additional extensions of the temporary joint tariff, to allow continuing negotiations. The final extension was scheduled to expire on July 29, 2011. *See, e.g., id.* ¶ ¶ 8-11.

The parties were unable to reach agreement on a new contract, and on or about July 22, 2011, UP notified SunBelt that UP would publish a new common carrier tariff applying to the UP segment of the interline movement, to replace the joint rate that would expire on July 29. *See*

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its previous Rule 11 rate in this case only, in recognition of the present exceptional circumstances.

[5] SunBelt's brief discussion of relevant chronology and events in its Reply, and its more extensive version of facts and events in its simultaneously filed Motion for Clarification, are incomplete and misleading at best. In this background section, NS provides a fuller and more accurate description of the relevant chronology and events. In its Reply to SunBelt's Motion for Clarification, NS will further respond to erroneous claims and unwarranted speculation and conclusions proffered by Complainant in that separate Motion.

id. ¶ 12 (stating that UP provided notice of its new tariff on July 22, 2011). UP's new local tariff, UPTF 4955 Item 1100 states that it was issued on July 22, 2011 and was effective on July 23, 2011. *See* Exhibit B to UP Motion (UPTF 4955, providing a local rate for service from New Orleans to LaPorte). Based on that notice from UP, SunBelt requested that NS issue a "Rule 11" rate to cover the McIntosh to New Orleans segment of the route after July 29, 2011. NS accommodated SunBelt's request by issuing a "Rule 11" rate for movement of chlorine from McIntosh to New Orleans, effective July 30, 2011.

On July 26, 2011—four days *after* UP issued its new local rate tariff for movement of chlorine from New Orleans to LaPorte—SunBelt filed a rate complaint against NS and UP, challenging the reasonableness of the common carrier tariff rates established by NS and UP for their respective portions of an interline movement of chlorine from McIntosh to New Orleans, and then from New Orleans to La Porte.[6] Thus, contrary to SunBelt's characterization, UP did not issue its new tariff "[s]ubsequent to [SunBelt's] Complaint." SunBelt Reply at 2. Rather, UP gave notice of its new local tariff, and published that tariff before SunBelt filed its Complaint. Moreover, when SunBelt filed its Complaint, it knew full well that when the joint tariff expired a mere three days later, any further challenge would necessarily be to the UP local rate and the NS "Rule 11" rate. SunBelt's feigned surprise at UP's issuance of a local tariff to replace the former joint rate is irreconcilable with the facts and with its own Complaint's express allegation that UP gave notice that it was going to issue such a tariff four days before SunBelt filed suit. See Complaint ¶ 12.

[6] These and other actual facts make clear that SunBelt's intemperate accusations – based in large part on its erroneous speculation about NS's intentions—that the defendant carriers are engaged in "gaming" the rate regulatory system are erroneous. *See, e.g.*, SunBelt Reply at 4-5.

From July 30, 2011 to the issuance of the NS new local tariff, SunBelt's traffic moved from McIntosh to New Orleans under NS tariff NSRQ 65912 (July 29, 2011), and from New Orleans to LaPorte under a separate UP local tariff.[7] That NSRQ 65912 "Rule 11" tariff rate contained a condition that "RATES ARE APPLICABLE ONLY ON SHIPMENTS DESTINED FOR BEYOND [New Orleans] TO LA PORTE, TX." On December 13, NS revised the tariff by removing the quoted condition, to make clear that NSRQ 65912 was a local tariff that SunBelt may use to move its traffic to New Orleans or combine with other carriers' rates for transportation from New Orleans to other destinations, including LaPorte (as UP discussed in its Motion, both UP and BNSF could transport SunBelt's traffic from New Orleans to LaPorte). All other terms and conditions of NSRQ 65912 (including the amount of the rate for movement of chlorine from McIntosh to New Orleans) are unchanged.

II. THE PARTIES AGREE THAT THE BOARD SHOULD DECIDE THRESHOLD MARKET DOMINANCE ISSUES BEFORE SUBMISSION OF SAC EVIDENCE.

A. The Board Should Rule on UP's Motion for Partial Dismissal Before the Parties Develop SAC Evidence in Order to Avoid Waste of Resources.

NS strongly agrees with UP that the Board should decide now whether UP possesses market dominance over the segment of transportation covered by UP's local tariff -- before the parties expend substantial resources developing SAC evidence. Indeed, SunBelt also urges the Board to determine market dominance now rather than deferring that determination to the end of the case. *See* SunBelt Reply at 2-3 (agreeing that UP's market dominance motion should be decided now "in order to avoid the expenditure of unnecessary resources by both the parties and the Board."). As UP demonstrated in its Motion, the presence of another rail carrier capable of transporting SunBelt's traffic between New Orleans and LaPorte raises "considerable doubt" as

[7] See UP Motion at 5; *id.* at Exhibit B (UPTF 4955, item 1100).

to (i) whether UP has market dominance over the issue transportation from New Orleans to LaPorte; and therefore (ii) whether SunBelt's can meet its burden to show the Board has jurisdiction over UP's local rate. *Sierra Pac. Power Co. v. Union Pac. R.R.*, NOR 42012, at 4 (served Jan. 26,1998). UP's *prima facie* showing of lack of market dominance creates the real possibility that UP will be dismissed from the case. That question should be resolved now to avoid time-consuming and costly discovery and forcing the parties to develop of multiple sets of different SAC evidence. If the Board determined after the close of the record that UP lacked market dominance, the parties would have engaged in substantial unnecessary discovery, and preparation of extensive SAC evidence that would be irrelevant and superfluous. Similarly, if the Board were to decide after all of the evidence has been submitted that UP does possess market dominance over its segment, the parties likely will have wasted substantial resources addressing other matters and evidence that are rendered irrelevant by that determination.

For example, parties would be required to conduct a SAC analysis based on two different SARRs, one designed to include the McIntosh to LaPorte route, and a second substantially different SAC presentation for a SARR based on the McIntosh to New Orleans route. In order to guard against the possibility of having failed to submit SAC evidence and analysis covering the route and rate resulting from the Board's delayed jurisdictional decision, both NS and SunBelt would be required to submit full SAC presentations to cover both contingencies. *See* SunBelt Reply at 2-3 (making essentially the same point). These possibilities would needlessly complicate the case, substantially increase the costs to the parties, and create unnecessary additional administrative burdens on the Board.

B. The Board Should Determine Whether It Has Jurisdiction to Hear a Challenge to UP's Local Rate by Examining Whether UP Has Market Dominance Over the Local Transportation to Which That Rate Applies.

As SunBelt acknowledges, Congress has mandated that the Board determine market dominance "for the transportation to which a rate applies." *See* 49 U.S.C. § 10707(a); SunBelt Reply at 7 (citing Section 10707(a)). UP established a local rate pursuant to its rate making initiative. A challenge to such a local rate is properly limited to the transportation to which the rate applies only, and not to transportation performed in combination with that local rate.

It is useful to review some of the important distinctions among different types of rates that the Board and ICC have established. A "local rate," also called a single-line rate, is "for transportation that is provided by only one carrier, with the transportation both originating and terminating on that carrier's line." *Ariz. Elec. Power Coop. v. Burlington Northern & Santa Fe Ry.*, STB Docket No. 42058 at 11-12 n.17 (served March 15, 2005). "Joint rates," in contrast, are "single-factor" interline rates between origin and destination over multiple railroads, and the shipper typically is not privy to the manner in which the rate is divided between the carriers. *Metro. Edison Co. v. Conrail*, 5 I.C.C.2d 385, 402 (1989). A "proportional rate" is a rate set by a single carrier that provides that it applies only to that carrier's portion of an interline movement. The difference between local rates and proportional rates is that proportional rates provide that they apply only to traffic which has a prior and/or subsequent movement on another carrier. The Board made this distinction clear in its first *Bottleneck* decision:

> A local rate is a rate for transportation originating and terminating on the carrier's line. A joint rate is a unitary (single-factor) rate set by mutual agreement between the participating carriers that is applied to a through movement, a movement that originates on one carrier's line and terminates on another's. A proportional rate is set by a single carrier for applicability **only** to its portion of a through movement. A proportional rate is different from a local rate because it is expressly conditioned to apply only to traffic

having a prior or subsequent move on another carrier through a specified interchange point.

Central Power & Light Co. v. Southern Pacific Transp. Co., 1 S.T.B. 1059, 1060 n.3 (1996) ("*Bottleneck I*") (emphases added); *Ariz. Elec. Power Coop. v. BNSF*, STB Docket No. 42058 at *23. n.17 (March 15, 2005); *FMC Wyo. et al v. Union Pac. R.R. Co.*, 4 S.T.B. 699, 705, n.3 (2000); *Met. Edison*, 5 I.C.C.2d 385, 402, n. 25 ("proportional rates provide that they may only be used for shipments originating beyond a certain point or destined beyond a certain point.").

Here UP has clearly elected to establish a local rate. Exercising its statutorily guaranteed rate initiative, UP established a local rate for transportation of chlorine from New Orleans to La Porte. *See* 49 U.S.C. §§ 10701(c) 11101(b). UP's rate applies to movement of chlorine on UP's lines from New Orleans to LaPorte. *See* Motion Exhibit B (UPTF 4955-1100, "Chlorine – New Orleans, LA to La Porte, TX"). By its terms, it is not restricted to use only in conjunction with another carrier's rate or only to a specific destination on another railroad. It is a textbook local rate. *See Bottleneck I*, 1 S.T.B. 1059, 1060 n.3 (1996).

If SunBelt chooses to use the UP local New Orleans-La Porte tariff in conjunction with NS's local McIntosh-New Orleans tariff, it may do so. But the transportation under the UP tariff is purely local, and in order to maintain a challenge to UP's local rate for the New Orleans to LaPorte movement, SunBelt must establish that the Board has jurisdiction over "the transportation to which [the New Orleans to La Porte] rate applies." *See* 49 U.S.C. § 10707(a); *see also Chevron Chemical v. Missouri Pacific Railroad Co.*, ICC Dkt. No. 40190 (March 2, 1988) (evaluating market dominance for one carrier's local segment of combination rate).[8] The

[8] The only case that SunBelt cites that might be construed to imply that market dominance should be determined with reference to an entire interline combination rate made up of local rates is a 78-year-old ICC decision, *Alabama Grocery*. In that case, the ICC indicated that where

Board should reject SunBelt's invitation to evaluate whether UP possesses market dominance over the transportation to which UP's *local* rate applies by reviewing whether UP and NS somehow have market dominance over an interline combination movement (governed by two separate local rates), one segment of which indisputably is not subject to that UP local rate.[9] Apparently, SunBelt advances that novel and untenable position because it lacks any good argument that UP possesses market dominance over transportation from New Orleans to La Porte. Tellingly, SunBelt offers no argument or evidence whatsoever to meet its burden of showing that BNSF service does not provide and effective alternative to UP transportation of the issue traffic from New Orleans to LaPorte.[10]

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it found combination rates unreasonable, it would determine "the extent to which each separate factor" (*i.e.* each local rate) is unreasonable. *Alabama Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co et al*, 197 I.C.C. 726, 727 (1933). In that particular case, however, the parties had presented no evidence of the reasonableness of the component local factors, so the ICC could not determine the reasonability of each carrier's local rate for its segment. *See id.* In the present case, of course, the parties are willing and able (if the Board has jurisdiction) to provide evidence concerning the reasonableness of the local rates at issue. As SunBelt observed, older ICC decisions are inconsistent with respect to challenges to local rates and related issues, and "to the extent there may be some inconsistent older case law on this subject, those decisions clearly have been superseded." SunBelt Reply at 10. Indeed, the sole case to cite *Alabama Grocery* in the last 50 years was *Huron Valley v. CSX Transp. Inc.*, ICC No. 40385, 1992 ICC LEXIS 214 at *9 (served Sept. 30, 1992). *Huron Valley* explained that *Alabama Grocery* involved "special circumstances" in which the amount by which the combined rate was found unreasonable could not be allocated (due to lack of evidence) between the constituent local factors. However, the ICC affirmed that the modern rule is that "carriers generally are not jointly and severally liable for each other's purely local rates."

[9] NS notes that SunBelt's Reply contains no argument addressing the question of whether UP has market dominance over that transportation, let alone any evidence or argument responding to UP's *prima facie* showing of effective competition for that local (to the UP system) transportation.

[10] SunBelt asserts only that BNSF does not like to carry TIH commodities. But the Board has made clear that carriers have a common carrier obligation to transport TIH. *See, e.g., BNSF Ry. – Petition for Declaratory Order*, FD 35164 at 6 (STB served Dec. 2, 2010) (quoting *Union Pac. R.R. – Petition for Declaratory Order*, FD 35219 at 3-4 (STB served June 11, 2009) ("Railroads have not only a right but a statutory common carrier obligation to transport hazardous materials 'where the appropriate agencies have promulgated comprehensive safety regulations.'").

C. If the Board Denies UP's Partial Motion to Dismiss, It Should Conduct an Expedited Market Dominance Inquiry and Determination.

At a minimum, the Board should expedite the determination of market dominance and should hold the schedule for discovery and submission of SAC evidence in abeyance while it considers whether UP has market dominance over the transportation to which the UP rate applies.[11] SunBelt concurs that, if the Board does not grant UP's motion to dismiss but instead determines that market dominance should be determined separately for the transportation provided by each of the individual carriers, then the Board should grant UP's alternative request for expedited determination of market dominance. *See* SunBelt Reply at 2-3 (does not address the question of NS market dominance, which was not addressed in UP Motion). NS agrees. NS further urges the Board to act expeditiously in order to progress the case in the statutorily allotted time of three years. *See* 49 U.S.C. § 49 11701(c).

Holding the schedule for discovery and submission of SAC evidence in abeyance while the Board considers the question of whether UP has market dominance over the transportation to which its rate applies is essential to the efficient litigation of this case. Putting the two defendant carriers on separate evidentiary tracks would require potentially superfluous discovery between and among all three parties and increase the administrative burden on the Board. Moreover, requiring NS and SunBelt to develop and submit SAC evidence before they know whether the UP route is part of the case would likely force these parties to expend the time, effort and resources to submit two full sets of SAC evidence, one of which will be unnecessary. Thus, if the Board conducts expedited determination of UP market dominance, it would be efficient and

[11] The Complainant has the burden of proving market dominance, and NS does not concede it is market dominant over the transportation to which the challenged rate applies. As UP observed in its Motion, the possibility of barge transportation between the origin and destination at issue may demonstrate lack of market dominance for the entire route.

appropriate for the Board to stay the schedule for submission of SAC evidence while it conducts an expedited determination of market dominance.

Previously, the Board has found that complex cases involving multiple defendants and changing geographic scope warrant special procedural treatment and consideration. *See Ariz. Elec. Power Coop. v. Burlington Northern & Santa Fe Ry.*, STB Docket No. 42058 at 1 (June 1, 2009) (modifying a procedural schedule due to the "complexities of this proceeding"). In addition, the Board has recently acknowledged the importance of the market dominance threshold and the wisdom of separate, expedited determination of that threshold jurisdictional issue in some circumstances. *Total Petrochemicals USA, Inc. v. CSX Transp. Inc.*, S.T.B. Docket No. NOR 42121, at 4 (served Apr. 5, 2011) (granting motion to expedite consideration of market dominance); *M&G Polymers USA, LLC v. CSX Transp.*, S.T.B. Docket No. NOR 42123, at 3 (served May 6, 2011) (same). Based on these precedents, the Board should expedite its market dominance determinations and hold the submission of SAC evidence in abeyance until it makes these threshold jurisdictional determinations. Such an approach would avoid the unnecessary complications and waste of resources that would likely result from determination of market dominance issues after the submission of all evidence in this complex case.

III. IN THE EVENT THE BOARD GRANTS UP'S MOTION TO DISMISS, SUNBELT MAY ONLY CHALLENGE NS'S RATE ALONE.

In the event the Board grants UP's motion to dismiss for lack of market dominance, and finds that NS possesses market dominance over the McIntosh to New Orleans transportation, then this case should proceed as a rate challenge to the NS local tariff, rather than requiring NS and SunBelt to obtain extensive third-party discovery from UP and to develop SAC evidence to cover an interline movement from McIntosh to New Orleans to LaPorte. Limiting the case to the McIntosh to New Orleans route that is local to NS would be consistent with Board precedent –

including the recent *AEPCO* decision – holding that local rates are properly evaluated individually in a rate case. To avoid ambiguity or confusion in this case, NS is willing to stipulate that local rate relief awarded to SunBelt in this case, if any, would apply from the date NS's Rule 11 rate became effective.

A. The Reasonableness of Local Rates Must Be Assessed Individually.

Local rates must be challenged individually.[12] The ICC found on multiple occasions that individual components of combination rates made up of "separately published factors (as opposed to proportional rates)" – such as local rates that are combined to construct a combination rate – are properly challenged individually. *See, e.g., Metropolitan Edison,* 5 I.C.C.2d at 406, n.27. [13] The ICC subsequently confirmed the corollary principle that "carriers are generally not jointly and severally liable for each other's purely local rates," and a shipper's

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[12] Rate reasonableness challenges to joint rates must challenge the entire through rate. *See, e.g., Bottleneck I,* 1 S.T.B. 1059, 1072; *L. & N.R.R. v. Sloss-Sheffield Co.,* 269 U.S. 217, 234 (1925). For purposes of rate reasonableness challenges, proportional rates are not distinguishable from joint rates: in both situations, a complainant may challenge only the entire through rate, not one or more component parts or factors of that through rate. *E.g., Great Northern Ry. v. Sullivan,* 294 U.S. 458, 463 (1935); *Metro. Edison Co.* 5 I.C.C.2d at 403, n.22. In *Bottleneck I,* the Board re-affirmed that rate reasonableness challenges to through routes composed of joint or proportional rates must address the entire through rate. *Central Power & Light Co. v. Southern Pacific Transp. Co.,* 1 S.T.B. 1059, 1072 (1996).

[13] *See also Thermond Co., Southern Division v. Baltimore & Ohio R.R. Co.,* 288 I.C.C. 793, 794 (railroads interchanging international traffic may avoid liability for the through rate by publishing a local rate only within the United States) *cf. Great Northern Ry. v. Sullivan,* 294 U.S. 458 (1935); *General Electric Co. v. The Baltimore & Ohio R.R. Co.,* 1987 ICC LEXIS 399, *20, n.12 ("If the challenged rates were combinations of local rates, [the ICC] could focus solely on the monopoly segment carrier" as opposed to the through route); *Chevron Chemical (Canada) Ltd. v. Missouri Pac. R.R. Co.,* 1988 WL 226266 (I.C.C.) at *2 (defendant railroad successfully argued that its component of a combination rate made up of local factors could not be challenged as unreasonable because the complainant did not demonstrate the carrier's market dominance over the segment of the route to which the rate applied); *Cost Ratio for Recyclables – 1993 Determination,* Ex Parte No. 394 (Sub-No. 11), at 2 (served Dec. 16, 1993) (single-line rates or combination rates made up of local rates are "those rates that would be assessed individually in a rate reasonableness case").

combination of two local rates does not make a single carrier liable for the reasonableness of the combination. *Huron Valley Steel Corp. v. CSX Transp. Inc.*, 1992 ICC LEXIS 214, *8. Thus, in the context of rate challenges, the Board and its predecessor have distinguished (i) joint and proportional rates from (ii) combination rates constructed of two or more local rates. Unlike a joint rate, a local rate covering a segment of an interline movement is properly challenged individually. *See, e.g., Huron Valley Steel,* 1992 ICC LEXIS 214, *8; *Thermond Co., Southern Division v. Baltimore & Ohio R.R. Co.*, 288 I.C.C. 793, 794; *see also AEPCO,* slip op at 13 (served Nov. 22, 2011). Moreover, when a local rate is challenged individually, the stand-alone railroad may rely only on a traffic group taken from the defendant railroad. *See, e.g., Arizona Elec. Power Coop. v. BNSF Railway Co. and Union Pacific RR Co.*, 6 S.T.B. 322, 328 (finding it would be "inappropriate for complainant to include non-UP traffic in the traffic group of any part of a SARR aimed at testing UP's single-line rates . . . UP's single-line rates should not be judges as if UP has the benefit of revenues from traffic in which it does not participate."). That restriction is necessary in part to allow the Board to determine whether the defendant railroad's rate for transportation only on the defendant is cross subsidizing other traffic on the defendant railroad. *See, e.g., Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) at 7 (served Oct. 30, 2006).

B. The Revised NS Tariff Establishes a Local Rate That May Only Be Challenged Individually.

Pursuant to its statutorily-granted authority to establish and amend rates and forms of rates, *see* 49 U.S.C. §§ 10701(c), 11101(b), NS issued an amended tariff on December 13, 2011. That tariff indisputably establishes a local rate. That tariff provides a "rate for transportation originating and terminating" on the NS system. *See* NSRQ 65912 (Dec. 13, 2011) (applies to chlorine shipments on the NS rail system from McIntosh to New Orleans); *see Bottleneck I,* 1

S.T.B. at 1060, n.3. Unlike a proportional rate, the NS local rate is not applicable "only to [NS's] portion of a through movement," and it imposes no condition limiting its application to "traffic having a prior or subsequent move on another carrier." *See Bottleneck I,* a S.T.B. at 1060, n.3[14]; *cf.* NSRQ 65912 (Dec. 13, 2011). The NS tariff issued December 13 constitutes a local rate, as it provides for transportation service between McIntosh and New Orleans on the NS system, regardless of whether the shipper (here SunBelt) chooses to combine NS's local rate with another carrier's rate in order to move the traffic to a destination served by another carrier. *See* NSRQ 65912. Thus, the rail transportation at issue in this case is currently governed by two separate local rates: (i) a local rate for movement on the NS system from McIntosh to New Orleans; and (ii) a local rate on the UP system from New Orleans to La Porte. As NS previously stated, given the extraordinary history of this case and to avoid additional complexity and confusion, it will not object to SunBelt's treating the NS "Rule 11" rate in place from July 30 to the present as a local rate for purposes of its rate challenge. If SunBelt wishes to maintain a challenge to the two carriers' local rates, it must challenge each rate individually, and make

[14] *See also Ariz. Elec. Power Coop. v. BNSF,* STB Docket No. 42058 at *23, n.17 (Released March 15, 2005) ("Joint and proportional rates are through rates, as opposed to a 'local rate,' which is a rate for transportation that is provided by only one carrier, with the transportation both originating and terminating on that carrier's line."); *FMC Wyoming,* 4 S.T.B. 699, 705, n.3 (2000) (same). As *Metropolitan Edison* explained, using the *Great Northern* and *L&N* Supreme Court decisions to illuminate the relevant difference between local and proportional rates, "Each proportional rate [at issue in *Great Northern*] necessarily was part of the through rate and was capable of use only as such. . . 'the Great Northern proportional cannot be applied save as it is a part of the through rate'" and such rates are "not merely the aggregate of individual local" rates. 5 I.C.C. 2d 385, 403, n. 22 (internal citations omitted) (emphasis added). Unlike the joint and proportional rates at issue in *Great Northern* and *Metropolitan Edison,* the NS tariff may be used for a purely local movement from McIntosh to New Orleans, or combined with another carrier's rate for interline movement to another destination, including LaPorte.

individual threshold market dominance showings for the transportation to which each of those separate local rates apply.[15]

In its recent *AEPCO* decision, the Board confirmed that joint rates and local rates for through movements are treated differently for purposes of rate cases. There, complainant Arizona Electric Power Company challenged the reasonableness of joint through rates established by BNSF Railway Company and Union Pacific Railroad Company. *AEPCO*, STB Docket No. NOR 42113, Decision at 12-13. The Board rejected the defendant carriers' attempt effectively to treat the challenged joint rates as local rates for certain rate case purposes. *See id.* Reiterating some of the history and precedents discussed above, the Board affirmed the appropriately different treatment of joint and local rates in rate reasonableness challenges, and

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[15] As NS will discuss in more detail in its Reply to SunBelt's Motion for Clarification, based on SunBelt/Olin's prior position and statements, it should not now be heard to oppose an NS local rate covering transportation from McIntosh to New Orleans. Indeed, given Olin's prior advocacy of forcing NS to quote such a local rate, it is not clear that Olin/SunBelt would oppose NS's amended tariff and the limitation of its rate reasonableness case against NS to the local rate. (Olin filed its Motion for Clarification before NS issued its amended local tariff). SunBelt's parent and McIntosh plant operator Olin Corporation has repeatedly informed NS and the Board that it wishes to challenge a rate for NS's segment of its interline movement from McIntosh to LaPorte. Indeed, Olin's official public comments and testimony to the Board have complained loudly about Olin's prior inability to obtain a local rate tariff for such an NS local movement, and asked the Board to issue rules that would force NS to quote such a rate. *See, e.g.*, Comments Submitted by Olin Corporation at 33, STB Ex Parte 705 (filed April 11, 2011) (discussing efforts to obtain contract rates from UP and BNSF "so that SunBelt could then use the private contract rate to force the NS to provide a bottleneck rate" for movements on the NS system originating at McIntosh.); *id.* at 18, 21 (advocating a requirement for rail carriers "to quote, upon request, a single line rate applicable from any origin or interchange point served by it to any destination or interchange point served by it without restricting in any way the application of such a single line rate in combination with other rail rates."). The local rate NS has published for the issue movement is precisely what Olin has been so ardently urging the Board to require: a single line local rate from McIntosh to New Orleans with no restriction on the combination of that rate with the rate(s) of another carrier. *See* Exhibit A. In combination with NS's offer not to contest a challenge to its prior proportional rate as if it were a local rate, NS has afforded Olin exactly what it has long claimed it desires: an NS local rate for movement of SunBelt's traffic from McIntosh to New Orleans, effectively from the date of filing of the case forward.

found that carriers could not seek to have their rates treated as a joint rate for some purposes and combined local rates for others. *See id.* The Board's discussion made clear that if a carrier wishes the rate it charges for its segment of an interline movement to be subject only to individual challenge and not to a joint through rate challenge, that carrier should establish a local rate for its portion of an interline movement. *See id.* at 13. In its discussion and holding on this issue, the Board stated, *inter alia*:

> [F]or practical purposes, when [multiple] carriers elect to offer a through rate, they are treated as a single legal entity. . . [D]efendants could have insulated themselves from a joint-rate challenge by issuing separately challengeable rates to the chosen point of interchange instead of a single joint rate. For example, UP could have quoted a transportation rate from the interchange point with BNSF to the utility plant. Had it done so, AEPCO could have challenged this rate from the interchange to the utility plant. . . . Instead, defendants here made a different choice and quoted a single joint rate for service from the coal mines to the plant. . . . Accordingly, we will not treat the single joint rate as we would two separately challengeable rates.

AEPCO, slip op at 12-13 (emphasis added). Here, UP did precisely what the Board advised UP could have done in the AEPCO situation to insulate itself from a joint rate challenge – it "quoted a transportation rate from the interchange point [with NS] to the [receiving facility]." Plainly, by "separately challengeable rate," the Board meant a local rate, such as those established by UP and by NS in the present case.

Thus, the recent *AEPCO* decision makes clear that if a carrier issues a local rate for its segment of an interline movement – as NS and UP have each done here—that local rate must be challenged separately. This decision, and the precedents on which it relies, are also consistent with the governing provision of the Commerce Act. Where a carrier has established a local rate and a shipper uses that rate in combination with another carrier's local rate, the statute delineating the Board's rate reasonableness authority further supports the conclusion that a single

challenge to the combined rate is not allowed. *See* 49 U.S.C. § 10704 (Board may hear challenge to rate "charged or collected" by a rail carrier, if the rate is otherwise within the Board's jurisdiction). Because the common carrier rate established by each carrier is a local rate (not a through rate or a joint rate), neither NS nor UP is "charging or collecting" a rate for the entire interline movement. Thus a challenge to the combination of two different carriers' local rates is outside the Board's statutory authority.

In sum, this agency's precedents, its governing statute, and efficient use of the resources of the parties and the Board all militate in favor of the same two conclusions: (1) The Board should decide whether and to what extent it has jurisdiction over a challenge to the reasonableness of the local rate established by UP before the parties are required to develop SAC evidence; and (2) NS's local rate may only be challenged individually, and not as part of a non-existent joint interline rate. *See AEPCO*, slip op at 12-13; 49 U.S.C. § 10704.

III. The Reasonableness of the Joint Tariff Rate Could Be Assessed Using the Approach of SunBelt's Choice.

If the Board were to grant UP's Motion for Partial Dismissal and SunBelt still wished to pursue a challenge to the joint tariff in effect from March through July 2011, then the Board would be left with two analytically distinct SunBelt rate challenges: (1) a SunBelt challenge to a joint rate that was in effect for four months prior to the filing of the Complaint; and (2) a SunBelt challenge to the NS local rates that have been in effect since July 30, 2011 and will be effective into the future.[16] The reasonableness of the joint tariff rate (which covered the entire NS-UP

[16] As NS has previously stated, given the exceptional circumstances, it would not object to SunBelt treating the "Rule 11" rate in effect from the end of July until the present as a local rate, for purposes of this rate case only. *See supra* at 15. SunBelt's speculation that NS and UP might re-establish a joint rate at some point during the pendency of this case that would necessitate another SAC analysis is a red herring. *See* SunBelt Petition for Clarification at 4 n.4. If UP's

through movement from McIntosh to La Porte during the parties contract negotiations) must be assessed separately from the reasonableness of the NS local rate (which covers NS's segment of the movement). SunBelt could cost-effectively litigate a separate challenge to the reasonableness of the joint tariff, either a SAC analysis for the entire McIntosh-La Porte route or one of the *Simplified Standards* approaches. Given the relatively limited time period covered by the joint tariff, it would appear that one of the *Simplified Standards* approaches might be more appropriate, but this is a choice that SunBelt is entitled to make. *See Simplified Standards for Rail Rate Cases*, Ex Parte No. 646 (Sub-No. 1), at 5 (Sept. 5, 2007) ("the shipper will evaluate the value of its own case and select the methodology that it believes is best suited for the amount at stake").

In its Motion for Clarification, SunBelt raises objections to making two evidentiary presentations for these analytically distinct challenges. NS will address those objections in detail and fully respond to SunBelt's Motion in NS's separate reply to that Motion. In short, however, SunBelt indisputably has available options for pursuing rate relief for the joint tariff, and it cannot use its unwillingness to avail itself of those options as a justification for the Board to allow it to seek a 10-year rate prescription using a SAC analysis of a joint through rate structure that no longer exists, and will not exist for 90 percent of the SAC analysis period. SunBelt knew that UP had published a local rate before it filed its Complaint. Particularly given those facts, SunBelt may not now use its unwillingness to present separate evidence for a four-month period as a basis for its unprecedented proposal to use a historical joint rate that is no longer in effect (and which SunBelt knew would not be in effect before it filed the Complaint) as the basis for

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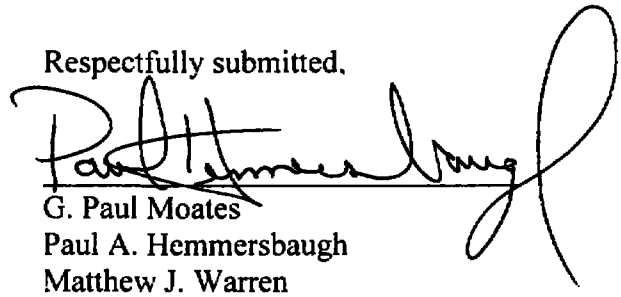
Motion is granted, NS will not replace the NS Local Tariff with a joint rate tariff for the McIntosh – La Porte movement during the pendency of this case.

determining the reasonableness of two current, separate local rates independently established, charged, and collected by two separate carriers.

CONCLUSION

For the reasons set forth above, NS respectfully requests that if the Board grants UP's Motion to Dismiss, the Board should also order that the Complainant may challenge only the NS local rate from McIntosh to New Orleans. If, in the alternative, the Board declines to dismiss UP, then NS respectfully requests that the Board grant the relief requested by UP and expedite its evaluation of whether UP is market dominant, to avoid the imposition of unnecessary burden and expense on the parties and the Board.

Respectfully submitted,



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Dated: December 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2011, I caused the foregoing Norfolk Southern Railway Company's Reply to Defendant Union Pacific Railroad Company's September 26, 2011 Motion for Partial Dismissal or, in the Alternative, Expedited Determination of Jurisdiction Over Challenged Rates to be served by first class mail, postage prepaid or more expeditious method of delivery on the following counsel for Complainant SunBelt Chlor Alkali Partnership and Defendant Union Pacific Railroad Company:

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Exhibit A

KSFIZER@NSCORP.COM
SUBJECT TO FUTURE INCREASES ADOPTED BY RAILROADS

N O R F O L K S O U T H E R N

R A T E A U T H O R I T Y T R A N S M I T T A L

RATE AUTHORITY : NSRQ 65912
SECTION : 001-B-00

FILE NUMBER : CHLORINE
THIS COPY WAS SENT ON : 12/13/2011 @ 08:16 AM

EFFECTIVE : 01/02/2012
EXPIRES : NO EXPIRATION DATE

PRODUCT MANAGER: K S FIZER 540-524-6064

THE FOLLOWING CONDITIONS APPLY TO THE ENTIRE AUTHORITY:

SUBJECT TO THE RULES AND PROVISIONS
(EXCEPT RULE 420) PUBLISHED IN NORFOLK SOUTHERN RAILWAY
CONDITIONS OF CARRIAGE #1 - SERIES OR SUCCESSOR PUBLICATION.

ITEM: 101000.00 ORIGIN ROAD: NS DESTINATION ROAD: NS
STCC: 2812815.00 CHLORINE GAS, LIQUEFIED

FROM: AL MCINTOSH TO:	PRICE	PER	MIN WT	EQUIP	NOTE REFERENCES
LA NEW ORLEANS	8088.00	CAR		T	01

NOTE REFERENCES/NUMBERS: (SEE LAST PAGES FOR COMPLETE NOTE TEXT)

01 0076 RATES APPLY ONLY IN TANK CARS
1249 NO MILEAGE ALLOWANCE TO BE PAID
G556 PRICES IN THIS AUTHORITY ARE NOT SUBJECT TO FUEL SURCHARGE.
Q543 RATE DOES NOT INCLUDE ANY COST OR NEED FOR PTC
3438 RATES CHARGED FOR REVERSE ROUTE WHEN SHIPMENT NOT UNLOADED

COMPLETE NOTE TEXT (IN NUMERICAL ORDER):

G556
PRICES IN THIS RATE AUTHORITY ARE NOT SUBJECT TO A
FUEL SURCHARGE.

Exhibit A

Q543 RATE DOES NOT INCLUDE ANY COST OR
NEED FOR POSITIVE TRAIN CONTROL (PTC) TO SERVE THIS TRAFFIC.

0076 APPLIES ONLY IN TANK CARS.

1249 NO MILEAGE ALLOWANCES PAID TO CONSIGN-
OR, CONSIGNEE OR OWNER OF CAR.

3438 WHEN A SHIPMENT HAS REACHED THE
DESTINATION BUT IS NOT UNLOADED AND IS RETURNED VIA THE SAME
ROUTE TO THE ORIGINAL SHIPPING POINT (FOR REASONS OTHER THAN
CARRIERS ERROR), THE RETURN MOVEMENT WILL BE AT THE RATE PROVIDED
IN THIS ITEM IN THE REVERSE DIRECTION APPLICABLE ON THE DATE THE
SHIPMENT IS TENDERED FOR RETURN.

THIS AUTHORITY HAS BEEN SENT TO THE FOLLOWING ADDRESSES:
KSFIZER@NSCORP.COM

Exhibit A